

The Rise of PACS: A New Type of Commitment from the City of Love

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I. INTRODUCTION

Cohabitation in the United States has been on the rise for decades, with millions of couples living together outside of marriage. According to a Census Bureau report in 2010, marital households comprised less than 50% of all households in the United States, while almost 6% of households were opposite-sex unmarried partners.¹ Over 7 million opposite-sex couples cohabited in 2010,² a dramatic increase from the 523,000 cohabitating couples in 1970.³ Between 2000 and 2010 alone, there was a 41% increase in unmarried couple households.⁴

Couples choose to cohabitate instead of marry for various reasons, such as insufficient finances,⁵ preferences to avoid the cultural and legal implications of marriage,⁶ or simply the lack of desire to get married.⁷

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1. Daphne Lofquist et al., *Households and Families: 2010*, CENSUS BUREAU 8 (April 2012). See also Jessica R. Feinberg, *The Survival of Nonmarital Relationship Statuses in the Same-Sex Marriage Era: A Proposal*, 87 TEMP. L. REV. 47, 62–63 (2014) [hereinafter Feinberg, *Survival of Nonmarital Relationship Statuses*].

2. Anna Stepień-Sporek & Margaret Ryznar, *The Consequences of Cohabitation*, 50 U.S.F.L. REV. 75, 77 (2016) [hereinafter Stepień-Sporek & Ryznar, *Consequences of Cohabitation*].

3. Katherine C. Gordon, Note, *The Necessity and Enforcement of Cohabitation Agreements: When Strings Will Attach and How to Prevent Them—A State Survey*, 37 BRANDEIS L.J. 245, 245 (1998-1999).

4. Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?*, 41 ACTEC L.J. 49, 55 (2015).

5. “Qualitative research reveals that marriage, although much revered in lower-income communities, is seen by many as appropriate only when a couple’s economic situation is secure, a situation that may not happen quickly for some groups, if ever. Interviews with working- and lower-middle-class cohabitants suggest that they believe marriage should not occur until financial stability has been reached, including not only the resources for a large wedding but perhaps also for home ownership.” Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J. L. & FAM. STUD. 1, 11 (2007) [hereinafter Bowman, *Social Science*]; see also Spencer Rand, *The Real Marriage Penalty: How Welfare Law Discourages Marriage Despite Public Policy Statements to the Contrary—And What Can Be Done About It*, 18 U.D.C. L. REV. 93, 93 (2015) (“Couples regularly complain about marriage penalties, discovering that the tax consequences of marrying make the cost of marriage prohibitive.”).

6. Stepień-Sporek & Ryznar, *Consequences of Cohabitation*, *supra* note 2, at 75.

7. Gordon, *supra* note 3, at 245.

Many cohabitations are temporary because cohabitants often eventually separate or marry.⁸ According to one study, only 10% of cohabitants are still cohabitating after 5 years.⁹

As long as a couple happily cohabitates, no legal intervention is needed. However, when the relationship ends, cohabitants discover that they are without remedies when it comes to property division,¹⁰ even if they share property.¹¹ Many cohabitants commingle their assets, provide money for down payments, or forgo professional opportunities, believing that such investments will be rewarded, even if the relationship were to end.¹² While this may be true upon divorce, many cohabitants do not know that the law treats them differently from married couples and provides them fewer protections upon separation.¹³

States have taken different approaches to property division at the end of a cohabitation.¹⁴ Indeed, cohabitation has encountered a wide range of social, legislative, and judicial reactions.¹⁵ Courts and state legislatures have struggled with how the law should treat cohabitants ever since the first court recognized a cohabitation contract in the 1970s in California.¹⁶ Courts continue to take inconsistent approaches when dealing with the end of a cohabitation.¹⁷

While property distribution upon divorce is based on fairness, the legal implications for cohabitants at the end of a relationship are not well-defined.¹⁸ However, the vast majority of states recognize express contracts between cohabitants,¹⁹ and many recognize implied contracts.²⁰

8. Waggoner, *supra* note 4, at 64–65.

9. Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 322 (2008). However, “approximately 60% of all U.S. cohabitants and 70% of those in a first, premarital cohabitation marry within five years.” *Id.*

10. See Anna Stepień-Sporek & Margaret Ryznar, *The Legal Treatment of Cohabitation in Poland and the United States*, 79 UMKC L. REV. 373, 390 (2010) [hereinafter Stepień-Sporek & Ryznar, *Legal Treatment of Cohabitation*]; see also John M. Yarwood, Note, *Breaking Up is Hard To Do: Mini-DOMA States, Migratory Same-Sex Marriage, Divorce, and a Practical Solution to Property Division*, 89 B.U. L. REV. 1355, 1365 (2009).

11. Yarwood, *supra* note 10, at 1365.

12. See Garrison, *supra* note 9, at 322. Marriage plays a pivotal role in whether or not cohabitating couples will remain together. *Id.* According to one study, approximately 10% of cohabitating couples who did not marry remained together after 5 years. *Id.* This study demonstrates that if couples are going to remain together, they typically marry within 5 years. *Id.* In fact, roughly 60% of cohabitating couples marry within this time frame. *Id.*

13. Stepień-Sporek & Ryznar, *Consequences of Cohabitation*, *supra* note 2, at 75–76.

14. *Id.* at 78.

15. Stepień-Sporek & Ryznar, *Legal Treatment of Cohabitation*, *supra* note 10, at 373.

16. Although many commentators have written about cohabitation, the law on the subject has remained relatively unchanged. See, e.g., Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?*, 64 LA. L. REV. 403 (2004); Garrison, *supra* note 9.

17. Stepień-Sporek & Ryznar, *Legal Treatment of Cohabitation*, *supra* note 10, at 376; see also Moore v. Sims, 442 U.S. 415, 435 (1979) (“Family relations are a traditional area of state concern.”).

18. Stepień-Sporek & Ryznar, *Legal Treatment of Cohabitation*, *supra* note 10, at 375.

19. *Id.* at 378.

20. See, e.g., *Salzman v. Bachrach*, 996 P.2d 1263, 1267 (Colo. 2000) (“In many jurisdictions, courts have examined the factual circumstances underlying unmarried cohabitating relationships, and have regularly enforced express and implied contracts between nonmarried cohabitants and provided equitable remedies.”).

Although the majority approach enforces contracts between cohabitants,²¹ a few states do not provide cohabitants any remedies on public policy grounds.²²

In 2001, the American Law Institute (“ALI”) proposed that long-term cohabitants falling under the definition of “domestic partners” have similar rights to those of married couples at the time of dissolution.²³ The ALI proposal defined “domestic partnership” and offered factors that characterize such a relationship.²⁴ If cohabitants shared a primary residence and a life together as a couple for a certain period, their relationship would be considered a domestic partnership under the ALI principles.²⁵ Although the ALI proposal intended to influence state legislatures, it has not been wholly successful.²⁶

The legal treatment of cohabitation is entirely different in France. In 1999, France adopted *Pacte Civil de Solidarite* [Civil Solidarity Pact] (“PACS”) to address the legal concerns of cohabitating couples.²⁷ PACS, originally proposed to protect same-sex cohabitants in France, became popular²⁸ with opposite-sex cohabitants as well.²⁹ PACS offered cohabitants rights and duties in their relationships³⁰ upon registration by a written agreement at the *tribunal d’instance* [Court of First Instance].³¹ “A PACS is a contract entered into by two natural persons of age, of different sexes or of the same sex, to organize their life in common.”³² Couples must bring several documents to their local court of first instance in order to register.³³ Upon registering, they receive many of the benefits of marriage, including income, estate, and gift tax benefits.³⁴ However,

21. See *infra* Part II.

22. Georgia, Illinois, and Louisiana do not enforce even express contracts regarding property between cohabitants unless the contract is entirely collateral to the relationship. See, e.g., *Long v. Marino*, 441 S.E.2d 475, 476–77 (Ga. Ct. App. 1994); *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1207–11 (Ill. 1979); *Schwegmann v. Schwegmann*, 441 So.2d 316, 324–26 (La. Ct. App. 1983).

23. Waggoner, *supra* note 4, at 93.

24. Yarwood, *supra* note 10, at 1384.

25. *Id.* at 1384–85; see also Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN’S L.J. 141, 177–79 (2004) (exploring the ALI definition of “Persons Who Share a Life Together”).

26. Stepien-Sporek & Ryznar, *Consequences of Cohabitation*, *supra* note 2, at 77–78.

27. Erin Cleary, *New Jersey Domestic Partnership Act in the Aftermath of Lewis v. Harris: Should New Jersey Expand the Act to Include All Unmarried Cohabitants?*, 60 RUTGERS L. REV. 519, 529 (2008).

28. Angélique Devaux, *The New French Marriage in an International and Comparative Law Perspective*, 23 TUL. J. INT’L & COMP. L. 73, 74 (2014).

29. Christina Davis, Comment, *Domestic Partnerships: What the United States Should Learn from France’s Experience*, 24 PENN ST. INT’L L. REV. 683, 684 (2006).

30. Cleary, *supra* note 27 at 529–30.

31. Davis, *supra* note 29, at 692.

32. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 515-1 (Fr.). Official translation of the French civil code in English, available at <https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations> [http://perma.cc/DK48-L8Y4]. See Daniel Borrillo, *Who Is Breaking with Tradition? The Legal Recognition of Same-Sex Partnership in France and the Question of Modernity*, 17 YALE J. L. & FEMINISM 89, 91 (2005) [hereinafter Borrillo, *Who Is Breaking with Tradition*].

33. See *infra* Part III.

34. Feinberg, *Survival of Nonmarital Relationship Statutes*, *supra* note 1, at 58.

they are also jointly liable for each other's debts.³⁵ PACS has its limitations,³⁶ but is nonetheless favored as a status by many cohabitating couples in France because it offers several benefits and is easy to dissolve.³⁷

The approaches to cohabitation in France and the United States raise questions regarding the role of contract and the autonomy of cohabitants to enter into binding agreements regarding property distribution at the conclusion of their relationship.³⁸ Although the United States has narrowly addressed contractual rights for cohabitants, France has implemented transformative measures to recognize these rights through PACS.

This Article analyzes both approaches, highlighting certain aspects of the French PACS, such as the expanded recognition of contractual rights. Accordingly, Part II begins by analyzing cohabitation laws in the United States, while Part III addresses French law on cohabitation. Part IV compares and analyzes cohabitation issues in both countries, highlighting certain aspects of the PACS system.

II. COHABITATION IN THE UNITED STATES

Unlike marriage, cohabitation remains largely an unprotected status throughout the United States despite strides to create rights for cohabitants since the 1970s.³⁹ Cohabitation, in both its rights and obligations, is separate and legally distinct from marriage. While cohabitation rates have risen dramatically, relevant laws have remained static and courts have struggled to deal with the end of a cohabitating relationship.⁴⁰

The California Supreme Court in *Marvin v. Marvin*,⁴¹ representative of the current majority approach, allowed the application of contract law

35. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 515-4 (Fr.). The exception is for clearly excessive expenditures. *Id.* See also Borrillo, *Who Is Breaking with Tradition*, *supra* note 32, at 92.

36. Devaux, *supra* note 28, at 74-75.

37. Davis, *supra* note 29, at 692.

38. Although cohabitation has seen dramatic increases in the United States, mainstream acceptance of cohabitation is a relatively recent development. In 2010, approximately 7.5 million opposite-sex couples cohabitated, a number that would increase substantially if same-sex couples were included. In 1960, however, the number was less than 500,000. Rose M. Kreider, *Increase in Opposite-sex Cohabiting Couples from 2009 to 2010 in the Annual Social and Economic Supplement (ASEC) to the Current Population Survey (CPS)*, 1 U.S. BUREAU OF THE CENSUS (Sept. 15, 2010), <http://www.census.gov/population/www/socdemo/Inc-Opp-sex-2009-to-2010.pdf> [<http://perma.cc/V4AQ-S3VP>]; Bowman, *Social Science*, *supra* note 5, at 2.

39. Stępień-Sporek & Ryznar, *Legal Treatment of Cohabitation*, *supra* note 10, at 375.

40. *Id.* In addition to property distribution issues at the end of a cohabitating relationship, issues related to childbearing may also appear. *Id.* In 2002, 33.8% of births in the United States occurred out of wedlock, and many of these births were the result of cohabitating relationships. *Id.* at 373. In 2014, more than 40% of births were to single women. *Unmarried Childbearing*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm> [<https://perma.cc/FRT2-TF69>].

41. 557 P.2d 106 (Cal. 1976).

to cohabitation for the first time in American history.⁴² *Marvin* permitted the recognition of an oral contract between cohabitants,⁴³ including both implied and express contracts as well as equitable remedies.⁴⁴ In contrast, the minority approach, adopted by some states such as Illinois, does not enforce cohabitation contracts on public policy grounds.⁴⁵

A. The Minority Approach: Borrowing from a History Against Cohabitation

The traditional rule regarding cohabitation, which now represents the minority approach, is that cohabitants do not have any rights between themselves or third parties.⁴⁶ *Hewitt v. Hewitt* notably articulated this view.⁴⁷

In *Hewitt*, Victoria and Robert Hewitt cohabitated as students in college.⁴⁸ After moving to Illinois, Robert worked in the medical field while Victoria cared for their children full-time.⁴⁹ Victoria also assisted Robert in building his medical practice, using her skills and her parents' financial assistance.⁵⁰ After 15 years of cohabitation, the couple separated and Victoria filed for divorce.⁵¹ The court dismissed the divorce action and held that Victoria was not entitled to any remedies,⁵² reasoning that giving her rights would devalue the institution of marriage⁵³ and would essentially revive common law marriage, a doctrine that Illinois abolished in 1905.⁵⁴

Ultimately, Victoria could not recover her contributions to the relationship⁵⁵ despite its similarity to marriage.⁵⁶ Given the *Hewitt* court's reasoning, a cohabitant could benefit from the other's contributions and leave the relationship with the couple's accumulated

42. *Id.*; see Stepień-Sporek & Ryznar, *Consequences of Cohabitation*, *supra* note 2, at 76.

43. *Marvin*, 557 P.2d at 122–23; see Adrienne Hunter Jules & Fernanda G. Nicola, *Section II. A: Civil Law: the Contractualization of Family Law in the United States*, 62 AM. J. COMP. L. 151, 160 (2014).

44. *Marvin*, 557 P.2d at 122–23.

45. *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1210 (Ill. 1979); see Stepień-Sporek & Ryznar, *Legal Treatment of Cohabitation*, *supra* note 10, at 391.

46. Cynthia Grant Bowman, *Legal Treatment of Cohabitation in the United States*, CORNELL LAW FACULTY PUBLICATIONS (2004), <http://scholarship.law.cornell.edu/facpub/148>

[<http://perma.cc/93WD-LWTX>] [hereinafter Bowman, *Legal Treatment*]. Indeed, society generally strongly disapproved of sexual relationships outside of marriage. See, e.g., *Schwegmann v. Schwegmann*, 441 So. 2d 316, 324 (La. Ct. App. 1983) (noting Louisiana's interest in discouraging "relationships which serve to erode the cornerstone of society, i.e., the family"); *Hewitt*, 394 N.E.2d at 1210 (rejecting the contract claims between unmarried cohabitants due to a public policy disfavoring "private contractual alternatives to marriage").

47. 394 N.E.2d 1204 (Ill. 1979).

48. *Id.* at 1205.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 1211.

54. *Id.*

55. *Id.*

56. *Id.*

wealth.

The *Hewitt* decision remains good law in Illinois.⁵⁷ Illinois has also denied legal protections to cohabitants in other contexts, including claims for loss of consortium.⁵⁸ Many subsequent cases base their decisions on *Hewitt*, illustrating the divergence from those jurisdictions that follow *Marvin*.⁵⁹

However, a challenge arose to *Hewitt* in Illinois in 2015. In *Blumenthal v. Brewer*,⁶⁰ the Illinois Court of Appeals held that a woman could bring claims against her former partner for property they owned together.⁶¹ However, the Illinois Supreme Court did not uphold this decision.⁶²

In *Brewer*, Jane Blumenthal and Eileen Brewer became same-sex domestic partners in the early 1980s.⁶³ Despite the absence of same-sex marriage in Illinois, the couple exchanged rings and presented themselves as a committed lifelong couple.⁶⁴

Over the course of nearly three decades, Blumenthal and Brewer built a life together, intertwined their finances, and raised three children.⁶⁵ While Blumenthal focused on providing financial support for the family, Brewer spent a substantial amount of time caring for their children and home.⁶⁶ After their relationship ended, Blumenthal sought partition of the property she owned with Brewer during their relationship.⁶⁷ Brewer counterclaimed for various common law remedies, such as sole title to the home and an interest in Blumenthal's ownership share in a medical group. Brewer's counterclaim aimed for the couple's overall assets to be equalized at the end of the cohabitation.⁶⁸ The Illinois Court of Appeals held that the state's "public policy to treat unmarried partnerships as illicit no longer exists" and that Brewer may continue with her claims regarding the property they acquired during the relationship.⁶⁹

The Illinois Supreme Court heard the appeal in August 2016 and refused to overrule *Hewitt*, determining that cohabitants cannot bring claims against one another to enforce property rights.⁷⁰ The court noted

57. See, e.g., *Ayala v. Fox*, 564 N.E.2d 920 (Ill. App. Ct. 1990).

58. *Medley v. Strong*, 558 N.E.2d 244, 248 (Ill. App. Ct. 1990).

59. See *infra* Part II, Section B.

60. 24 N.E.3d 168 (Ill. App. Ct. 2014).

61. *Id.* at 183.

62. *Blumenthal v. Brewer*, No. 118781, 2016 Ill. LEXIS 763, at *59–60 (Ill. Aug. 18, 2016).

63. *Id.* at *3.

64. *Id.* at *35–36.

65. *Id.*

66. *Id.*

67. *Id.* at *1.

68. *Id.*

69. *Id.* at *2–3.

70. *Id.* at *3.

that the legislature should determine whether a change in public policy governing the rights of parties in non-marital relationships is necessary.⁷¹

In a few states like Illinois, where cohabitants do not receive marital rights, people have reason to hesitate before making significant investments in a non-marital relationship.⁷² Without adequate remedies, cohabitants could face financial hardship at the end of a cohabitating relationship.⁷³ For these reasons, *Hewitt* has been debated for decades and the majority approach has recognized contractual rights for cohabitants.⁷⁴

B. The Majority Approach: A Contract Approach

The majority approach stems from the first case in the United States recognizing cohabitation contracts, *Marvin v. Marvin*.⁷⁵ Prior to this case, contracts between cohabitants were unenforceable because they were viewed as based on meretricious consideration.⁷⁶

In *Marvin*, the California Supreme Court reversed the lower court and held that express contracts between cohabitants could be judicially enforced unless they were explicitly based on meretricious consideration.⁷⁷ Additionally, the court concluded that if cohabitants did not enter into an express contract, the court should consider whether the conduct of the parties established an implied contract.⁷⁸

In the case, Michelle Triola alleged that Lee Marvin, an award-winning actor, entered into a contract to support her if she forewent a singing career to serve as a homemaker.⁷⁹ After six years together, the couple separated and Michelle sought enforcement of their alleged contract.

71. *Id.* at *54.

72. *Id.*; see *supra* note 22.

73. See *supra* note 22. Furthermore, remedy-less cohabitation may discourage marriage because a divorce likely would mean a loss of property by the higher income spouse. See, e.g., Margaret Ryznar, *All's Fair in Love and War: But What About in Divorce? The Fairness of Property Division in American and English Big Money Divorce Cases*, 86 N.D. L. REV. 115–47 (2010).

74. See, e.g., J. Thomas Oldham, *Unmarried Partners and the Legacy of Marvin v. Marvin: Lessons from Jerry Hall v. Mick Jagger Regarding U.S. Regulation of Heterosexual Cohabitants or, Can't Get No Satisfaction*, 76 NOTRE DAME L. REV. 1409, 1433 (2001) (“I have proposed that the current United States approach should be changed, at least for those cohabitation relationships of some duration where a partner has suffered career damage due to the relationship, either by being a primary caretaker for a common child or for some other reason.”).

75. 557 P.2d 106 (Cal. 1976).

76. In *Marvin v. Marvin*, the court held that a contract was unenforceable due to meretricious consideration (consideration for immoral and illicit sexual services, such as prostitution) “only if sexual acts form[ed] an inseparable part of the consideration for the agreement.” *Id.* at 114; Bowman, *Social Science*, *supra* note 5; see Long v. Marino, 441 S.E.2d 475, 476 (Ga. Ct. App. 1994) (“Meretricious sexual relationships are by nature repugnant to social stability, and our courts have on sound public policy declined to reward them by allowing a money recovery therefor.”).

77. *Marvin*, 557 P.2d at 112.

78. *Id.* at 122.

79. *Id.* at 110.

Although the Court of Appeals ruled against Michelle, the California Supreme Court reversed in her favor, holding that a contract between unmarried partners should be enforced except to the extent that it explicitly rests on the consideration of meretricious sexual services.⁸⁰ On remand, the court held that no contract existed.⁸¹ Thus, although *Marvin* did not ultimately result in recovery by Michelle, it did establish that cohabitants' rights could be based on express or implied contracts in California.⁸²

Many states followed *Marvin* and adopted a contract-based rights approach, albeit with limitations.⁸³ For example, some states only recognized express contracts,⁸⁴ while other states have required cohabitants' contracts to be in writing.⁸⁵

Several cases in California have received attention for limiting *Marvin's* application. In *Friedman v. Friedman*,⁸⁶ a California appellate court denied relief to a disabled woman, despite her twenty-five year relationship and two children with her cohabitating partner.⁸⁷ In that case, Terri and Elliott Friedman began cohabitating in their early twenties.⁸⁸ During this time, Terri and Elliott bought a home and signed joint tax returns, and lived as a typical family.⁸⁹ While Elliott attended law school, Terri raised their children.⁹⁰

The facts from *Friedman* appeared to warrant a *Marvin* approach.⁹¹ In addition to having a longer relationship, Terri and Elliott Friedman lived a conventional life and raised children together. Nonetheless, Elliott successfully argued that he did not contract to support Terri at the end of their relationship, and the court agreed.⁹² The court reasoned that the couple's conduct did not amount to an implied contract.⁹³

Following the court's decision in *Friedman*, confusion surrounded the contractual remedies for cohabitants in California.⁹⁴ In *Friedman*, the court ultimately rejected evidence of an implied contract because the

80. *Id.* at 122–23.

81. *Id.*

82. *Id.*

83. Bowman, *Social Science*, *supra* note 5.

84. *See, e.g., Morone v. Morone*, 413 N.E.2d 1154, 1158 (N.Y. 1980). More recent case law decisions have recognized oral cohabitation contracts. *See Dee v. Rakower*, 112 A.D.3d 204, 206 (N.Y. App. Div. 2013).

85. *See, e.g., Cohabitation; Agreements and Contracts*, MINN. STAT. ANN. §§ 513.075–.076 (West 2016).

86. 24 Cal. Rptr. 2d 892 (Ct. App. 1993).

87. Bowman, *Legal Treatment*, *supra* note 46, at 126 (citing *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892 (Ct. App. 1993)).

88. *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892, 894 (Ct. App. 1993).

89. *Id.* at 897.

90. *Id.* at 895.

91. *See, e.g., Bowman, Legal Treatment*, *supra* note 46, at 127.

92. *Id.* (citing *Friedman*, 24 Cal. Rptr. at 899).

93. "The record before us discloses no conduct on the part of the parties from which it can be implied that the parties (particularly appellant) intended to promise that respondent would be supported as if she and appellant had actually been married if the relationship ended." *Friedman*, 24 Cal. Rptr. 2d at 899.

94. Bowman, *Legal Treatment*, *supra* note 46, at 127.

conduct of the parties did not demonstrate that Elliott agreed to support Terri following dissolution of their relationship, as in marriage.⁹⁵

Thus, individual judges may apply different reasoning and reach various results, illustrating the uncertainty associated with contributing to a cohabitating relationship. Accordingly, even in the majority of states recognizing cohabitation contracts, cohabitating couples may not be sure of their financial situation if their relationship ends.

C. Alternative Protections of Cohabitants

In the United States, cohabitants may be protected through methods other than contract rights. These include domestic partnerships, the putative spouse doctrine, and other equitable doctrines.

1. Domestic Partnerships

In 2001, the ALI proposed a set of new rules regarding family dissolution, *Principles of the Law of Family Dissolution: Analysis and Recommendations*.⁹⁶ The ALI drafters proposed that cohabitants, regardless of their gender, be treated as partners under certain circumstances.⁹⁷ The ALI defined “domestic partnership” as a new legal family status and addressed its dissolution.⁹⁸

The proposal moved away from *Marvin*’s implied and explicit contract approach, instead establishing a series of factors to determine whether a couple had sociological and psychological marital ties.⁹⁹ If so, marriage law would be applicable to the couple. When cohabitants wanted to opt out of the commitment, they would do so by a written agreement.¹⁰⁰

Under the ALI proposal, no affirmative act is required to show relationship status,¹⁰¹ but there are thirteen factors to assess the relationship¹⁰² and determine whether a couple shared a life together.¹⁰³ Additionally, the court reviews if the couple “share[d] a primary residence and a life together as a couple” for a significant period.¹⁰⁴

To prove shared residence, the following may determine residency:

95. *Id.*

96. Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute’s “Domestic Partners” Proposal*, 2001 BYU L. REV. 1189, 1192 (2001).

97. Oldham, *supra* note 74, at 1420.

98. Wardle, *supra* note 96, at 1195.

99. Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565, 1583 (2009).

100. *Id.*

101. Oldham, *supra* note 74, at 1420.

102. Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 850 (2005).

103. Lifshitz, *supra* note 99, at 1605.

104. Yarwood, *supra* note 10, at 1384–85.

driver's licenses, tax returns, credit card bills, bank statements, utility bills, and W-2 forms.¹⁰⁵ The report does not define "a significant period," but states that three years would be a reasonable choice.¹⁰⁶

The factors to assess the relationship also include participation in commitment ceremonies, intermingling finances, economic dependence, defining tasks and roles, and raising children jointly.¹⁰⁷ Courts review the factors and decide if the couple was in a "domestic partnership,"¹⁰⁸ and the property dissolution is based on the characteristics of the relationship.¹⁰⁹

According to the ALI principles, the parties are subject to property and compensatory payment once the relationship is defined as a domestic partnership.¹¹⁰ The proposal recommends a higher percentage of separate property be transferred to marital property based on the length of the cohabitation.¹¹¹ The ALI proposal grants compensatory damages for any economic loss incurred during the relationship.¹¹² The existence of a domestic partnership alone will not guarantee compensatory damages, but may require a certain vesting period; thus, long-term cohabitants may be eligible for compensatory damages.¹¹³

Scholars have offered commentary on the ALI proposal.¹¹⁴ They have noted that the ALI proposal only extends the legal status for same-sex couples and protects their economic status upon breakup.¹¹⁵ Some have viewed it as an attempt to update the definition of common-law marriage.¹¹⁶ Others have suggested that providing protection for cohabitating couples would weaken the institution of marriage.¹¹⁷

While the ALI Principles have not been significantly influential, some states have legislation on domestic partnerships or civil unions.¹¹⁸

105. Oldham, *supra* note 74, at 1430.

106. *Id.* at 1420.

107. Lifshitz, *supra* note 99, at 1605-06.

108. *Id.* at 1606.

109. Yarwood, *supra* note 10, at 1383.

110. Grace Ganz Blumberg, *Unmarried Partners and the Legacy of Marvin v. Marvin: The Regularization of Nonmarital Cohabitation: Rights and Responsibility in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1299 (2001).

111. Lifshitz, *supra* note 99, at 1612.

112. Yarwood, *supra* note 10, at 1385.

113. Blumberg, *supra* note 110, at 1299.

114. Wardle, *supra* note 96, at 1223.

115. *Id.*

116. Oldham, *supra* note 74, at 1420.

117. Wardle, *supra* note 96, at 1226.

118. See, e.g., *Civil Unions & Domestic Partnership Statutes*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Nov. 18, 2014), <http://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx> [<http://perma.cc/NLU4-GDWQ>]. "Dozens of states and scores of municipalities have created nonmarital statuses like civil unions and domestic partnerships for those who (until recently) could not, or chose not to, marry. Tens of thousands of couples currently access a combination of rights and responsibilities through those statuses, ranging from employment benefits to hospital access to all of the other rights and responsibilities of marriage." Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1510 (2016).

However, these statutes may be limited, such as to people in same-sex or opposite-sex relationships who are over sixty-two years of age. The similarity of benefits to marriage provided by such statutes depends on the state.¹¹⁹

2. Other Protective Doctrines

Couples who lived together in the United States without the traditional protections of marriage were not always denied a remedy.¹²⁰ Common law marriage provided long-term cohabitating couples with remedies upon the dissolution of their relationship under certain circumstances.

Common law marriage does not require a marriage license, ceremony, or marriage certificate.¹²¹ Instead, couples are generally treated as spouses if they agree to live together as husband and wife and they hold themselves out as spouses to family and friends.¹²² In fact, some courts infer a couple's agreement from their cohabitation and their representations to the community that they are spouses.¹²³

Until the twentieth century, nearly half of the states recognized common law marriage.¹²⁴ Although only a few states now recognize the doctrine, its influence extends beyond them.¹²⁵ If a couple meets the criteria for common law marriage in a jurisdiction that recognizes the doctrine, and subsequently moves to a state that does not, the couple's marriage remains valid.¹²⁶

Common law marriage was viewed as marriage, albeit entered into a different way.¹²⁷ It originally aimed to protect the more vulnerable spouse.¹²⁸ If the relationship met the jurisdictionally specific criteria for a common law marriage, the courts would grant a woman all the rights of a wife.¹²⁹ Thus, although different from cohabitation, common law marriage responded to similar legal issues that cohabitants encounter today.¹³⁰

However, common law marriage is becoming more uncommon

119. *Civil Unions & Domestic Partnership Statutes*, *supra* note 118.

120. Bowman, *Legal Treatment*, *supra* note 46, at 122.

121. "Except for the handful of jurisdictions that recognize common law marriages, all states require those seeking marriage to perform some type of procedure that is relatively uniform but often oddly burdensome." Adam Candeub & Mae Kuykendall, *Modernizing Marriage*, 44 U. MICH. J.L. REFORM 735, 747, 753 (2011).

122. *Id.*

123. Bowman, *Legal Treatment*, *supra* note 46, at 122 (citing *Metro. Life Ins. Co. v. Johnson*, 121 Ill. App. 257 (Ill. App. Ct. 1905)).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. See generally D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW* 214 (2016).

129. *Id.* at 215.

130. Bowman, *Legal Treatment*, *supra* note 46, at 122.

today.¹³¹ Given the modern acceptability of cohabitation, unmarried couples are less motivated to outwardly express their status as husband and wife.¹³² Additionally, only a few jurisdictions still recognize common law marriage.¹³³

Courts have also applied remedial doctrines to provide relief to cohabitants, such as the putative spouse doctrine.¹³⁴ The putative spouse doctrine allows the civil effects obtained through a legal marriage to apply to a void marriage when the parties believed in good faith that their marriage was valid.¹³⁵

The case of *Estate of Vargas*¹³⁶ is commonly cited for the putative spouse doctrine. In *Estate of Vargas*, Juan Vargas lived as a husband and father to two different families.¹³⁷ Neither woman knew about the other until Vargas passed away and both women claimed his estate.¹³⁸ Dividing the estate between the two women, the court decided that the second woman was a putative spouse.¹³⁹ The court reasoned that an innocent party who has solemnized a void marital union acquires putative spouse status.¹⁴⁰ In this case, the second woman married Vargas with a good-faith belief that he was divorced from his first wife.¹⁴¹ In short, *Estate of Vargas* demonstrates how the putative spouse doctrine protects innocent parties harmed by reliance on a partner.¹⁴²

Courts have applied various equitable doctrines to protect vulnerable cohabitants. Of these doctrines, equitable restitution, constructive trust, and quantum meruit are common.¹⁴³ For example, if a cohabitant contributed to the down payment on a home, courts may require the other cohabitant to return the amount that had unjustly enriched him or her.¹⁴⁴

Thus, even in states that choose not to recognize cohabitation as a status with legal rights and obligations, there may be protections for a vulnerable party if a cohabitating relationship ends. This illustrates

131. *Id.*

132. *Id.* at 123.

133. *Id.*

134. *Id.*

135. Christopher L. Blakesley, *Putative Marriage Doctrine*, 60 TUL. L. REV. 1, 60 (1985-1986). "The classic putative marriage doctrine is substantive, ameliorative or corrective; it is designed to allow all the civil effects—rights, privileges, and benefits—which obtain in a legal marriage to flow to parties to a null marriage who had a good faith belief that their 'marriage' was legal and valid." *Id.*

136. 36 Cal. App. 3d 714 (Ct. App. 1974).

137. *Id.* at 716.

138. *Id.*

139. *Id.* at 717.

140. *Id.*

141. *Id.*

142. *Id.* Although putative spouses are treated as married, their marriage is not valid otherwise. Thus, putative spouses are essentially living as cohabitants. *Id.*

143. Bowman, *Legal Treatment*, *supra* note 46, at 122.

144. *Id.*

judicial interest in protecting people from the negative consequences created by a consequential relationship, even when it falls short of marriage.

III. COHABITATION IN FRANCE

Just as in the United States and much of the world, French law historically did not recognize cohabitation. Societal changes ultimately led French courts to recognize some legal rights of cohabitating couples.

The most significant change in the French approach to cohabitation occurred in 1999, when lawmakers enacted PACS to protect both same-sex and opposite-sex cohabitating couples by providing legal rights and duties to those registered.¹⁴⁵ A few years earlier, the Netherlands had allowed cohabitating couples to register for legal protection.¹⁴⁶ Many countries in Europe have since offered some form of protection for cohabitants.¹⁴⁷

A. A History of Nonrecognition of Cohabitation

The French Civil Code of 1804 did not recognize cohabitation.¹⁴⁸ According to Napoleon, “*Les concubins ignorent la loi, la loi ignore les concubins* [Cohabitants ignore the law, the law ignores cohabitants].”¹⁴⁹ Thus, the vast historical differences between marriage-based rights and those provided to cohabitants stemmed from the Napoleonic mentality that if couples choose the flexibility of cohabitation, they must accept the lack of a legal status.¹⁵⁰

Accordingly, cohabitants historically were under no legal obligation

145. See *infra* Part III. The European Union has recently enacted regulations to further protect unmarried couples, which will come into force in 2019. See Council Regulation 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, 2016 O.J. (L 183) (EU).

146. Scott Titshaw, *The Reactionary Road to Free Love: How DOMA, State Marriage Amendments, and Social Conservatives Undermine Traditional Marriage*, 115 W. VA. L. REV. 205, 292 (2012).

147. *Id.* at 269.

Although similar to Germany's and Belgium's counterpart regimes, France's regime is more like a semi-marriage. In terms of the legal rights and obligations that flow from it, France's *Pacte Civil de Solidarité* ranks somewhere in between Germany's life partnership and Belgium's cohabitation légale. Some exclusions are, among other things: presumption of paternity, adoption, statutory survivor's pension, intestate inheritance, certain aspects of tax law, and citizenship.

Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries*, 38 NEW ENG. L. REV. 569, 588 (2004); see Katharina Boele-Woelki, *Private International Law Aspects of Registered Partnerships and Other Forms of Non-Marital Cohabitation in Europe*, 60 LA. L. REV. 1053 (2000).

148. Joelle Godard, *PACS Seven Years On: Is It Moving Towards Marriage?*, 21 INT'L J.L. POL'Y & FAM. 310, 310 (2007).

149. *Id.* at 311. Concubinage is the sexual union of an unmarried man and woman who live in private and public as if they were spouses for a certain period of time. Jorge A. Vargas, *Concubines Under Mexican Law: With a Comparative Overview of Canada, France, Germany, England and Spain*, 12 SW. J.L. & TRADE AM. 45, 57 (2005). Unlike in the United States, where each state has its own family law, France has one Civil Code in the country that applies to all people within its borders. *Id.* at 85.

150. Vargas, *supra* note 149, at 85.

to provide support for each other and faced no legal sanctions for infidelity.¹⁵¹ Furthermore, cohabitants did not receive tax benefits.¹⁵²

Demographic changes related to marriage and cohabitation arose in the twentieth century,¹⁵³ with the number of marriages in France continuously decreasing since the late 1960s.¹⁵⁴ Many people in France, as in other countries, moved away from the institution of marriage and instead chose to cohabit.¹⁵⁵ Cohabitation allowed them to experience a shared way of life without a lifelong commitment.¹⁵⁶

Despite the historical views on cohabitation in France, legal reforms starting in the late 1970s attempted to give cohabitants rights that were more comparable to those enjoyed by married couples.¹⁵⁷ For instance, the 1970s brought reforms for cohabitants in the field of social security, permitting cohabitants to claim sickness and maternity benefits from their partner's contributions.¹⁵⁸ Cohabitants' legal status was also enhanced with respect to parental responsibility, albeit likely to protect children rather than cohabitants.¹⁵⁹

Several movements to grant cohabitating same-sex couples rights followed.¹⁶⁰ For example, an unsuccessful proposal for same-sex partnership registration arose in the early 1990s, called the *Contrat d'Union Civile*.¹⁶¹

In 1999, PACS was introduced to protect cohabitants regardless of their gender.¹⁶² PACS was part of the institutional change led by the socialist French government, which included radical changes in family law, such as the simplification of divorce and other rejections of traditional principles.¹⁶³

A notable debate followed in the French Parliament regarding the types of couples eligible under PACS.¹⁶⁴ Many people reacted negatively toward PACS¹⁶⁵ and to gain support for the bill, opposite-sex couples were included as its beneficiaries.¹⁶⁶ When PACS was first proposed in

151. Helen Stalford, *Family Law*, in *PRINCIPLES OF FRENCH LAW* 7 (John Bell, Sophie Boyron & Simon Whittaker eds., 2008).

152. *Id.*

153. Claude Martin & Eirne Thry, *The PACS and Marriage and Cohabitation in France*, 15 INT'L J.L. POL'Y & FAM. 135, 136 (2001).

154. *Id.*

155. Godard, *supra* note 148, at 311.

156. Martin & Thry, *supra* note 153, at 136.

157. Stalford, *supra* note 151, at 7.

158. *Id.*

159. *Id.*

160. *Id.*

161. Godard, *supra* note 148, at 312.

162. Devaux, *supra* note 28, at 74.

163. David Bradley, *Regulation of Unmarried Cohabitation in West-European Jurisdictions—Determinants of Legal Policy*, 15 INT'L J.L. POL'Y & FAM. 22 (2001).

164. Godard, *supra* note 148, at 312.

165. See Bradley, *supra* note 163, at 36.

166. Caroline Forder, *European Models of Domestic Partnership Laws: The Field of Choice*, 17 CAN. J.

the National Assembly, there was even a mention of including relationships that were mere “homesharers,” such as siblings who live together. However, the Constitutional Council decided to exclude any platonic relationships and limit the law to quasi-marital relationships.¹⁶⁷ In 1999, the French Parliament adopted PACS,¹⁶⁸ and the law gained public support of over 70%.¹⁶⁹

B. The French PACS

According to Article 515-1 of the Civil Code,¹⁷⁰ PACS is a binding contract, providing legal security to an agreement between cohabitants regarding personal matters, including property issues.¹⁷¹ It is a contract between two adults sharing their lives, a common residence, and a romantic relationship.¹⁷²

“A civil pact of solidarity (pacs) is a contract entered into by two natural persons of age, of different sexes or of the same sex, to organize their life in common.”¹⁷³ While “life in common” does not seemingly require that a couple be engaged in a sexual relationship, the language of the *Conseil Constitutionnel* indicates that a PACS between friends would be fraudulent and void.¹⁷⁴ The PACS law is constitutional, according to the *Conseil Constitutionnel*, subject to “life in common” being interpreted to mean “life as a couple”:

[T]he notion of life in common does not involve only a community of interests and is not limited to a requirement of simple cohabitation between two persons; . . . the life in common mentioned in the referred law supposes, beyond a common residence, a life as a couple, which is all that justifies the legislature’s providing for certain causes of the nullity of a pact which, either reproduce the obstacles to marriage aimed at preventing incest [no PaCS between close relatives], or avoid a violation of the obligation of fidelity resulting from marriage [a married person may not

FAM. L. 371, 389 (2000).

167. Bradley, *supra* note 163, at 33.

168. Stalford, *supra* note 151, at 9.

169. Borrillo, *Who Is Breaking with Tradition*, *supra* note 32, at 92.

170. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 515-1 (Fr.). Official translation of the French civil code in English, available at <https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translationsallows> [<http://perma.cc/DK48-L8Y4>]; see also Godard, *supra* note 148, at 312.

171. Stalford, *supra* note 151, at 258.

172. Borrillo, *Who Is Breaking with Tradition*, *supra* note 32, at 91.

173. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 515-1 (Fr.). Official translation of the French civil code in English, available at <https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translationsallows> [<http://perma.cc/DK48-L8Y4>]; see Borrillo, *Who Is Breaking with Tradition*, *supra* note 32, at 91 (citing CODE CIVIL [C. CIV.] [CIVIL CODE] art. 515-1 (Fr.) ([T]he “contract [is] concluded between two adult individuals, of different sexes or of the same sex, to organize their life in common (*vie de couple*).”).

174. *Id.* But see David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, 24 HARV. J.L. & PUB. POL’Y 623, 642 n.74 (2001) (“French secondary school teachers and members of the military are using France’s cohabitation certificate (PACS) as a means to be placed in favorable teaching positions or to avoid military service. Of the 14,000 PACS signed since last November, 2000 involve secondary school teachers and it is expected that most of those were contracted for and entered for fraudulent purposes of avoiding placement in bad weather areas or with violent pupils.”).

enter into a PaCS].¹⁷⁵

This interpretation is binding under Article 62 of the French Constitution.¹⁷⁶ The interpretation of "life in common," meaning "life as a couple," demonstrates the *Conseil Constitutionnel's* intent to prevent people from entering into PACS for convenience alone.¹⁷⁷ Instead, PACS is reserved for couples who commit their lives to one another, but decide to forgo traditional marriage.¹⁷⁸ PACS offers a compromise between marriage and cohabitation, which includes recognition of unmarried same-sex unions.

The benefits of registering under PACS are somewhat similar to marital rights, but there are differences.¹⁷⁹ Cohabiting couples under PACS can file joint tax returns and are exempt from the survivor's inheritance tax.¹⁸⁰ The legal consequences of PACS include financial support for one another, joint debt liability to third parties, sharing of expenses, and allocation of property at the time of dissolution.¹⁸¹ PACS agreements bestow a variety of financial, property, and succession rights not otherwise provided to cohabitants.¹⁸²

In terms of property distribution, the default regime under a PACS agreement is *la separation de biens*. Under this regime, unless otherwise agreed upon within the PACS contract, each member of the couple is separately responsible for that party's own property and assets.¹⁸³ PACS permits couples to negotiate and enter into agreements on how to manage and distribute their jointly owned property if their relationship were to end.¹⁸⁴ Thus, the more vulnerable party can receive a return of investment.

A residence permit for foreign partners in a PACS is available after discretionary review.¹⁸⁵ In addition, because a PACS implies a reciprocal dependency, any benefits for widows, single parents, and other single people no longer apply, such as family allowances, housing benefits, disability allowances, and unemployment benefits.¹⁸⁶

175. Daniel Borrillo, *The "pacte Civil de Solidarite" in France: Midway Between Marriage and Cohabitation*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS. A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 485 (Robert Wintemute & Mads Andenas eds., 2001) [hereinafter Borrillo, *pacte Civil de Solidarite*].

176. *Id.*

177. *Id.* at 485.

178. *See supra* Part III.

179. Feinberg, *Survival of Nonmarital Relationship Statuses*, *supra* note 1, at 57.

180. *Id.* at 58.

181. Cleary, *supra* note 27, at 530.

182. Stalford, *supra* note 151, at 10.

183. Feinberg, *Survival of Nonmarital Relationship Statuses*, *supra* note 1, at 57.

184. *Id.*

185. Borrillo, *Who Is Breaking with Tradition*, *supra* note 32, at 92. Specifically, a foreign partner bound by a PACS is allowed to receive a "carte de séjour vie privée et familiale."

186. Stalford, *supra* note 151, at 260.

Unlike marriage, which requires two witnesses and a ceremony, a PACS can easily be formed with two original copies of a signed contract, proof of birthplace, and documentary evidence that neither cohabitant is married or in another PACS.¹⁸⁷ Once recorded by a clerk at the Court of First Instance, *tribunal d'instance*, the PACS becomes effective.¹⁸⁸ The couple can modify the contract anytime by filing a joint written declaration with the court.¹⁸⁹

PACS agreements have a few eligibility restrictions. A proposed partner must be at least 18 years old¹⁹⁰ and have the legal capacity to enter into contracts.¹⁹¹ A couple should share a common residence,¹⁹² preventing people from signing PACS for other reasons.¹⁹³ A PACS has similar limitations to marriage in that a PACS cannot be signed "between ascendants and descendants in direct line, between relatives by marriage in direct line and between collaterals until the third degree inclusive."¹⁹⁴ This prevents a PACS from arising between a parent and child, grandparent and grandchild, parent-in-law and child-in-law, uncle/aunt and nephew/niece, and siblings.¹⁹⁵ Similar to marriage, which prohibits bigamy, a monogamous relationship is required between partners in a PACS,¹⁹⁶ which means that neither partner can be married or in another PACS.¹⁹⁷

There are several ways for a couple to dissolve a PACS: (1) if either party gets married; (2) upon the death of one party; (3) by mutual consent; or (4) if one party unilaterally decides to terminate the relationship.¹⁹⁸ If either party gets married, the PACS terminates immediately.¹⁹⁹ If this occurs, the married partner must notify the other partner and provide the *tribunal d'instance* with a copy of the notice and a birth certificate.²⁰⁰ Similarly, upon the death of a spouse, the surviving partner must send a copy of the death certificate to the *tribunal d'instance* where the PACS originated and the PACS is immediately dissolved.²⁰¹

If both parties agree to end the PACS by mutual consent, they must

187. Davis, *supra* note 29, at 692.

188. Godard, *supra* note 148, at 313.

189. Davis, *supra* note 29, at 692.

190. At the age of eighteen, an individual is capable of entering into a contract. However, in order to enter into a PACS agreement, the proposed partner must also meet all traditional requirements for the ability to contract. Borrillo, *pacte Civil de Solidarite*, *supra* note 175, at 485.

191. Borrillo, *Who Is Breaking with Tradition*, *supra* note 32, at 91.

192. *Id.*

193. Davis, *supra* note 29, at 691.

194. Godard, *supra* note 148, at 313 (citing art. 515-2 § 1 Civ. C.).

195. Borrillo, *Who Is Breaking with Tradition*, *supra* note 32, at 91.

196. Godard, *supra* note 148, at 313.

197. Borrillo, *Who Is Breaking with Tradition*, *supra* note 32, at 91.

198. *Id.* at 91.

199. Feinberg, *Survival of Nonmarital Relationship Statutes*, *supra* note 1, at 72.

200. *Id.*

201. Davis, *supra* note 29, at 692.

each submit joint declarations to the *tribunal d'instance*.²⁰² After a note is made on the original PACS agreement, the PACS is considered immediately dissolved.²⁰³ However, if only one party wishes to end the PACS, the party must provide notice to the other party in writing and submit a copy to the *tribunal d'instance* where the PACS originated. The PACS will dissolve three months later.²⁰⁴

In sum, PACS provides cohabitating couples with a legal status and facilitates the execution of a binding contractual agreement at the outset of their relationship. If their agreement changes, or if additional property is obtained by the couple during the relationship, PACS permits amendments. In the event of a dissolution, couples can enforce their PACS agreement and exit the relationship with a remedy.

Overall, PACS blends the flexibility of cohabitation with some of the legal security of marriage.²⁰⁵ PACS thus creates a third type of union that is less formal than marriage, but more formal than cohabitation.²⁰⁶

PACS is different from marriage in several ways, such as the lack of reciprocal rights of inheritance between cohabitants.²⁰⁷ Unless there is a will,²⁰⁸ PACS partners are not subject to automatic inheritance and survivor's rights,²⁰⁹ and they are not entitled to the equivalent of a widow's pension.²¹⁰ Additionally, PACS does not provide alimony or spousal support once the relationship dissolves.²¹¹ However, before the legalization of same-sex marriage in 2013,²¹² PACS was the only way for same-sex couples to legally form a partnership in France.²¹³

When PACS was first introduced in 1999, the Minister of Justice noted that it was not the same as the institution of marriage.²¹⁴ Specifically, commitment and formalities were the major differences between PACS and marriage.²¹⁵ PACS intended to introduce an

202. Feinberg, *Survival of Nonmarital Relationship Statutes*, *supra* note 1, at 57.

203. *Id.* at 72.

204. *Id.* at 57.

205. Stalford, *supra* note 151, at 9.

206. Borrillo, *pacte Civil de Solidarite*, *supra* note 175, at 475.

207. Devaux, *supra* note 28, at 74–75.

208. Borrillo, *Who Is Breaking with Tradition*, *supra* note 32, at 92.

209. Feinberg, *Survival of Nonmarital Relationship Statutes*, *supra* note 1, at 57.

210. Stalford, *supra* note 151, at 261.

211. Feinberg, *Survival of Nonmarital Relationship Statutes*, *supra* note 1, at 57.

212. *Id.*

213. Stalford, *supra* note 151, at 258. Same-sex couples may marry and jointly adopt children in France since 2013. *Id.*

214. Bradley, *supra* note 163. “When the French legislation was adopted, there was insufficient support to make the PACS more similar to marriage.” Waaldijk, *supra* note 147, at 588. “The legislative debates leading up to the PACS statute stressed that it was about providing economic security to those who cannot or do not want to marry.” Nancy D. Polikoff, *Recognizing Partners But Not Parents / Recognizing Parents But Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 726 (2000).

215. See *supra* note 214.

intermediate status between civil marriage and concubinage.²¹⁶ Furthermore, while PACS has evolved toward an institution similar to marriage,²¹⁷ its partners are free to marry, but it would end their PACS.²¹⁸

The flexibility and legal protections offered by PACS have caused their popularity to surge. Couples who register under PACS often view it as a convenient way to acknowledge their relationship without any risk of divorce.²¹⁹

When the French Parliament adopted PACS, approximately 42% of couples who entered into PACS agreements were opposite-sex.²²⁰ Today, however, over 90% of PACS agreements are between opposite-sex couples.²²¹ The number of registered opposite-sex couples under PACS has been continuously increasing, and there are now two PACS for every three marriages.²²²

It is clear that many couples across France are choosing PACS and benefiting from the legal status.²²³ Couples register in order to acknowledge their relationship and gain benefits similar to those of marriage without worrying about a complicated divorce.²²⁴ Not all couples registered under PACS consider it a replacement for marriage, with many viewing it instead as a “low-risk trial run” before marriage.²²⁵ PACS may explain the decrease in the number of marriages in France, but it also increased the number of legally recognized relationships as a whole.²²⁶

In sum, PACS has enabled over five million cohabitating couples to take advantage of favorable legal provisions.²²⁷ Before the introduction of PACS, only married couples enjoyed many benefits.²²⁸ Since the introduction of PACS, cohabitating couples are able to register to gain

216. Borrillo, *Who Is Breaking with Tradition*, *supra* note 32, at 91; see Harry D. Krause, Essay, *Marriage for the New Millennium: Heterosexual, Same Sex—Or Not at All*, 34 FAM. L.Q. 271, 298 (2000) (citing Mary Ann Glendon comparing nonmarital cohabitation to concubinage in France).

217. Devaux, *supra* note 28, at 74.

218. Forder, *supra* note 166, at 386.

219. Davis, *supra* note 29, at 696.

220. Edward Cody, *Straight Couples in France Are Choosing Civil Unions Meant for Gays*, WASH. POST (Feb. 14, 2009), <http://www.washingtonpost.com/wpdyn/content/article/2009/02/13/AR2009021303365.html> [<http://perma.cc/JVP7-2DRX>].

221. *Id.* Recent statistics are available at http://www.insee.fr/fr/themes/tableau.asp?ref_id=NATTEF02327 [<http://perma.cc/EU39-L6EC>].

222. Feinberg, *Survival of Nonmarital Relationship Statutes*, *supra* note 1, at 57. “If trends continue, new civil unions will outnumber marriages in France.” Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11, 37 (2012).

223. Davis, *supra* note 29, at 690.

224. *Id.* at 691.

225. Titshaw, *supra* note 146, at 282. “A significant number of couples have opted to marry after spending a period of time in a PACS.” Jessica Feinberg, *Gradual Marriage*, 20 LEWIS & CLARK L. REV. 1, 38 (2016) [hereinafter Feinberg, *Gradual Marriage*].

226. Feinberg, *Gradual Marriage*, *supra* note 225.

227. Forder, *supra* note 166, at 389.

228. Davis, *supra* note 29, at 684.

some of those benefits.²²⁹

IV. A COMPARATIVE ANALYSIS

In response to rising cohabitation rates, courts and legislatures across the globe have implemented various approaches.²³⁰ The United States and France represent two such approaches, and a comparison of them suggests that while neither country aims to protect cohabitants equally to marriage, both countries utilize contract rights as a method of protection for the more vulnerable cohabitant.²³¹

Lawmakers in the United States may choose to consider aspects of the French PACS system.²³² While the laws in the United States do not provide any set frame of contract for cohabitants to protect the more vulnerable party, France has created PACS to facilitate such protection. Thus, France may offer new ideas for protecting the more vulnerable party in cohabitations.

While domestic partnerships exist in some American states, many cohabitants do not enter into them²³³ and they are in fact different from PACS.²³⁴ Nonetheless, registering for similar statuses to PACS may be less popular in the United States compared to France.²³⁵ The ease of divorce²³⁶ and the contractual autonomy in premarital agreements in the United States may explain the low desire for an alternative to marriage.²³⁷ However, the PACS approach may be appealing to cohabitants who wish to delay marriage.²³⁸

229. *Id.*

230. See generally Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167 (2015); Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276 (2014) ("Family law is now replete with proposals advocating for the legal recognition of nonmarital relationships."); see also Bill Atkin, *The Legal World of Unmarried Couples: Reflections on "De Facto Relationships" in Recent New Zealand Legislation*, 39 VICT. U. WELLINGTON L. REV. 793, 793-94 (2009) ("There are several [legal] approaches [to cohabitation] that can be taken, for example: laissez faire, leaving the parties to rely on the general law for any remedy; an 'opt-in' scheme, which enables parties to jointly sign up to a legislatively determined regime (or perhaps to choose from more than one option); a special statutory scheme that is imposed on the parties, possibly with an opt-out mechanism; or the equation of unmarried relationships with marriage (and civil unions or registered partnerships if they exist in the country).").

231. Oldham, *supra* note 74, at 1431.

232. "[Despite] important differences, a few elements make the French experience applicable. For one thing, the reality is that in the United States, as in France, there is a growing societal need to craft a family law that is responsive to the situation at hand. The number of divorces, nonmarital unions, and children born to unmarried parents necessitates a response from the courts and, eventually, the political system." Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 646 (2013).

233. See *supra* Part II.

234. "These marriage alternatives are different from civil unions in other countries in that they are not 'marriage by a different name'; they are registered cohabitation." Aloni, *supra* note 232, at 577 (discussing "registered contractual relationships" in Europe).

235. See Titshaw, *supra* note 146, at 279.

236. In some European countries, divorce can take up to six years. *Id.* at 279.

237. *Id.* See also Margaret Ryznar & Anna Stepień-Sporek, *To Have and to Hold, For Richer or Richer: Premarital Agreements in the Comparative Context*, 13 CHAP. L. REV. 27 (2009) [hereinafter Ryznar & Stepień-Sporek, *To Have and to Hold*].

238. Cleary, *supra* note 27, at 530.

Although cases like *Marvin* and its progeny work to provide rights for cohabitants, their application may be inconsistent.²³⁹ In the case-by-case adjudication method that follows *Marvin* or similar cases, cohabitation cases require extensive fact finding with varying results.²⁴⁰ In contrast, there is one regime for regulated cohabitants in France, making it a coherent and comprehensive option.²⁴¹

An important prerequisite to legal consistency toward cohabitation in the United States is defining cohabitation, as well as its duties and rights.²⁴² For example, cohabitation can be defined as a stable relationship of a certain duration that is similar to marriage or a registered partnership.²⁴³ This proposed definition would allow states to better approach cohabitation in a uniform and predictable way. In France, couples are clearly defined as being in a PACS due to the registration requirements.

While developing comprehensive regulations for cohabitants is not necessary or perhaps not even desirable,²⁴⁴ it would be useful for states to develop a framework to enforce rights between cohabitants.²⁴⁵ Like France, which recognizes PACS throughout the country, lawmakers in the United States may consider providing basic protections to cohabitants through expanded freedom of contract.

To extend such protections to cohabitants, state courts could more predictably recognize contracts between cohabitants and permit couples to enter into, amend, dissolve, and enforce private agreements regarding their relationships.²⁴⁶ Contracts would allow couples to arrange their

239. When it comes to the legal treatment of cohabitation, “[W]e find two extremes: cohabitants have little or no rights, or they have duties imposed upon and imputed to them as if they are married, when they have chosen not to marry.” Lynne Marie Kohm & Karen M. Groen, *Cohabitation and the Future of Marriage*, 17 REGENT U. L. REV. 261, 267 (2005). Both of these extremes have obvious disadvantages.

240. Blumberg, *supra* note 110, at 1298; see Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 712 (2006) (“Claims arising out of failed domestic relationships also raise questions about the capacity of courts to assess what is just between parties.”).

241. “While there are countless ways to structure a nonmarital relationship recognition regime to differentiate it further from marriage, if one of the primary objectives of pluralistic relationship recognition involves moving away from the one-size-fits-all structure of marriage, then it would make sense to create a regime that provides people with greater autonomy in structuring their relationships.” Jessica R. Feinberg, *Avoiding Marriage Tunnel Vision*, 88 TUL. L. REV. 257, 302 (2013).

242. *Id.* at 288.

243. Stepień-Sporek & Ryznar, *Consequences of Cohabitation*, *supra* note 2, at 100.

244. While cohabitation is increasing, it is possible that such numbers are the result of a lack of regulation. It is possible that couples are choosing to cohabitate because they do not want to be regulated similarly to marriage. Nevertheless, cohabitants can use freedom of contract in order to protect themselves at the end of a relationship.

245. Stepień-Sporek & Ryznar, *Legal Treatment of Cohabitation*, *supra* note 10, at 389.

246. Problematically, it has been suggested that women may not be able to bargain as aggressively as men and therefore need judicial protection. Andrew J. Cherlin, *Toward a New Home Socioeconomics of Union Formation*, in THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION 133 (Linda J. Waite ed., 2000) (“[W]omen do not bargain as far toward the margins of their power as men do.” (quoting Paula England & Barbara Stanek Kilbourne, *Markets, Marriages, and Other Mates: The Problem of Power*, in BEYOND THE MARKETPLACE 163, 171 (Roger Friedland & A.F. Robertson eds., 1990))). However, these concerns have not prevented the enforcement of agreements in other contexts, such as premarital agreements. See, e.g., Ryznar & Stepień-Sporek, *To Have and to Hold*, *supra* note 237, at 27.

affairs and be responsible for the consequences of their cohabitating relationships, without the need for excessive regulation. Although societal views change with time, the United States may look to France to develop a better understanding of changing societal viewpoints and the perspectives of individuals who choose to forgo the traditional marital route.

The current American majority approach, as expressed in *Marvin*, thus could be expanded to encompass cohabitants in all states. This would allow cohabitants to decide the consequences of their relationship and protect them in the future. By implementing freedom of contract and autonomy, cohabitants would construct their relationship in a manner that meets their expectations.²⁴⁷ Perhaps most importantly, cohabitants would construct their own agreements in a manner that courts would more predictably uphold. By recognizing contracts between cohabitants more universally, states would extend rights to couples and protect vulnerable cohabitants.

State court clerks could also provide couples with information about entering into contracts at the outset of their cohabitating relationship.²⁴⁸ Providing contractual rights for couples is not an adequate solution if cohabitants do not understand those rights or do not believe that they are necessary. Thus, courts and governmental entities could provide information through the internet, pamphlets, and other materials to better inform cohabitating couples of their right to enter into binding agreements.²⁴⁹

In the absence of contractual agreements, courts in the United States could continue to use the doctrines of unjust enrichment and other equitable doctrines to remedy unjust circumstances where one cohabitant has benefitted at the other's expense.²⁵⁰ For example, when one cohabitant has contributed to a large down payment on a home without a contractual agreement, the court could award compensation based on the circumstances of the cohabitating relationship. Although this case-by-case remedy may seem onerous, it is similar to divorce proceedings and would protect cohabitants who fail to take advantage of their contract rights.²⁵¹

247. Stępień-Sporek & Ryznar, *Legal Treatment of Cohabitation*, *supra* note 10, at 388.

248. Some court clerks already provide certain information to potential litigants. See Dorothy Brown, CLERK OF THE CIRCUIT COURT IN COOK COUNTY, ILLINOIS, <http://www.cookcountyclerkofcourt.org/?section=FormsPage&FormsPage=3500&FORMNAME=&TITLE=&Submit=Submit> [<http://perma.cc/5FUN-B34U>].

249. There is some similar effort to publicize the putative father registries that preserve nonmarital fathers' rights. See, e.g., Mary Beck, *Toward A National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031 (2002).

250. Stępień-Sporek & Ryznar, *Legal Treatment of Cohabitation*, *supra* note 10, at 390.

251. *Id.*

V. CONCLUSION

The dramatic increase in cohabitation rates throughout the United States and France has caused a variety of legal issues, sparked numerous debates, and prompted both countries to respond. One important issue is the protection of vulnerable cohabitants after dissolution of the relationship.

Lawmakers in both the United States and France do not want to create another status for cohabitants or to provide protection that is similar to marriage, yet both countries offer some contract rights to cohabitants to help protect them.²⁵² Although the two countries' goals are similar, the level of contract rights provided to cohabitants differs in each country, as well as the predictability of their enforcement and the amount of information on cohabitation agreements available to the public.

The United States could benefit from considering aspects of the PACS system. Perhaps most importantly, states could allow and publicize the freedom of contract for cohabitating couples, including the right to amend and dissolve agreements throughout the duration of the relationship. It is important to provide couples with information regarding their ability to contract, or else they may not contract due to a lack of knowledge.

The United States has struggled to provide adequate remedies to vulnerable cohabitants. Although *Hewitt* is no longer the majority approach, states have failed to establish a comprehensive or consistent approach to cohabitation. The *Marvin* approach offers contract rights to cohabitants to resolve their issues at the end of the relationship, but this approach may be limited in application, leaving cohabitants vulnerable to financial harm at the end of a relationship.

France, meanwhile, has completely transformed the idea of cohabitation and promoted a more formal option of contract in this context. Specifically, PACS allows both same-sex and opposite-sex couples to enter into legally enforceable agreements regarding virtually any aspect of their relationship. In addition to providing legal status, couples are free to amend or dissolve their PACS agreement with ease at any point during their relationship.

Overall, lawmakers and courts in both the United States and France have responded to the rise in cohabitation rates in different ways. France provides couples with a formal option that protects parties in the event of the dissolution of their cohabitation. By considering aspects of the PACS system, including increasing the amount of information available to

252. Oldham, *supra* note 74, at 1431.

cohabitants, states can better protect vulnerable cohabitants through autonomy and freedom of contract. This increased protection will then allow states to more efficiently solve common disputes at the end of a cohabitating relationship and provide safeguards for vulnerable cohabitants.